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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 TOM SPARKS,

9 Plaintiff,

10 v.

11 AMERICAN FAMILY MUTUAL
12 INSURANCE COMPANY,

13 Defendant.

CASE NO. C18-5038 BHS

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT,
DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT, AND DENYING
PLAINTIFF'S MOTION FOR
SANCTIONS

14 This matter comes before the Court on Defendant American Family Mutual
15 Insurance Company's ("American Family") motion for summary judgment (Dkt. 7) and
16 Plaintiff Tom Sparks's ("Sparks") cross-motion for summary judgment (Dkt. 9). Also
17 before the Court is Sparks's motion for Rule 11 sanctions. Dkt. 17. The Court has
18 considered the pleadings filed in support of and in opposition to the motions and the
19 remainder of the file and for the reasons stated below (1) denies American Family's
20 motion for summary judgment, (2) denies Sparks's motion for sanctions, and (3) grants in
21 part and denies in part Sparks's motion for summary judgment.
22

I. BACKGROUND

On November 27, 2015, a fire significantly damaged Sparks's home in Bonney Lake, Washington. Dkt. 1-2 at 2. The fire also destroyed his personal property in the home. *Id.*

Sparks made a claim for his covered property under the "Gold Star Homeowners Policy" he purchased through American Family, which provided dwelling, personal property, and loss of use coverage. Dkt. 8-1 at 5–6. The policy allowed Sparks to recover the "Actual Cash Value" of his damaged or destroyed personal property under the following settlement provision:

1. REPLACEMENT COST. Except for property listed in 2. or 3. below the following applies:

a. until **you** make the actual repair or replacement, we will pay only the **actual cash value** of the damaged property;

b. After **you** complete repair or replacement, we will pay the difference between the **actual cash value** of the damaged property and the cost to repair or replace such property;

c. If property is not repaired or replaced within two years after the date of loss, we will pay only the **actual cash value** of the damaged property.

Dkt. 8-1 at 30. The policy defines "Actual Cash Value" as follows: "**Actual Cash Value** means the amount it costs to repair or replace property with property of like kind and quality less depreciation for physical deterioration and obsolescence." Dkt. 8-1 at 3.

The policy also requires that, after a loss, claimants submit to American Family "a detailed inventory of the damaged property, showing the quantities, when and where acquired, original cost, current value and the amount of loss," attaching "to the inventory bills, receipts and related documents that substantiate all amounts." Dkt. 8-1 at 13.

1 A public adjuster compiled an inventory of personal property on behalf of Sparks
2 and transmitted the inventory to American Family. Dkt. 10-1 at 34–75. The inventory
3 included the room in which the personal property was located; a description of the
4 property including brand, type, and model if known; the source or URL of the website
5 from which the items were available or purchased; prices; taxes and shipping; and
6 miscellaneous notes that sometimes detailed information such as whether an item was
7 “new,” “hand made,” “no longer made.” *Id.* The inventory estimated the replacement cost
8 total of Sparks’s destroyed property at \$108,783.23. *Id.* at 34.

9 On July 6, 2016, American Family responded to the public adjuster and confirmed
10 that it had received the inventory. Dkt. 10-1 at 77. American Family also noted that the
11 inventory did not reference the age of the listed property. *Id.* therefore, American Family
12 requested that the adjuster “[p]lease add an additional column to [the] worksheet and
13 provide the age of each item.” *Id.*

14 On January 16, 2017, American Family returned its own estimate of Plaintiff’s
15 loss. Dkt. 10-2. American Family estimated the replacement cost value as \$89,452.90. *Id.*
16 at 2. American Family also estimated that Sparks’s personal property had sustained
17 \$52,111.75 in depreciation, resulting in an estimated actual cash value of \$36,007.70. *Id.*
18 American Family’s inventory included a description of each item, unit prices, estimated
19 replacement cost, estimated depreciation, and estimated actual cash value. *Id.* at 7–137.
20 The depreciation estimate also included a notation of the age of the covered item and a
21 generic estimate of the items’ expected lifespan. *Id.* Accordingly, a sample of American
22 Family’s estimate appears as follows:

Back Porch continued...						
Description	Qty	Unit Price	Taxes	Replacement Cost Total	Less Depreciation	Actual Cash Value
Pricing Provide by PA	1.00 EA	\$39.99	\$3.52	\$43.51	-\$21.76 (5/10yr)	\$21.75
1,079. Werner 24' Aluminum Extension Ladder - 225lb.						
Pricing Provide by PA	1.00 EA	\$159.00	\$13.99	\$172.99	-\$8.65 (1/20yr)	\$164.34
1,080. Assorted Potting Containers - Various Sizes						
Pricing Provide by PA	1.00 EA	\$75.00	\$6.60	\$81.60	-\$32.64 (4/10yr)	\$48.96

Dkt. 10-2 at 137.

Notably, a review of the estimate shows that American Family's depreciation estimate was obtained simply by dividing the item's price by the number of years for its estimated lifespan, multiplying that number by the item's estimated age, and then subtracting that number from the item's price. The formula can be expressed as

$$\text{Replacement Cost} - \text{Age} \times (\text{Replacement Cost} / \text{Estimated Lifespan}) = \text{Actual Cash Value.}$$

For instance, in regards to Sparks's Werner 24' Aluminum Extension Ladder, the total replacement cost estimate of \$172.99, divided by the estimated lifespan of 20 years, yields a value of \$8.6495. Because the ladder was only one year old, the price of \$172.99 less the total of \$8.6495 multiplied by one year, equals American Family's estimated actual cash value of \$164.3405. Similarly, the estimated total replacement cost of Sparks's assorted potting containers (\$81.60) divided by their expected lifespan (10 years), multiplied by the containers' age (4 years), and then subtracted from the estimated replacement cost value (\$81.60), yields American Family's estimated actual cash value (\$48.96).

1 On January 17, 2017, the public adjuster responded via email to American
2 Family's estimate. Dkt. 10-3 at 3–4. The public adjuster noted that there was a
3 “significant depreciation taken on a number of items, including 100% depreciation taken
4 on several items.” *Id.* Accordingly, the public adjuster requested that American Family
5 explain the formula it used to calculate depreciation. *Id.* at 4.

6 On January 20, 2017, American Family responded via email, stating that its
7 depreciation calculations were “based on [the items'] age over their expected lifespan.”
8 Dkt. 10-3 at 2–3. Additionally, American Family's email stated that in response to the
9 public adjuster's email they had “changed the depreciation from 100% to 90% to give
10 some value to those” items that American Family had deemed worthless based on their
11 age. *Id.* at 3. On February 8, 2017, the adjuster replied by email to state, “I don't see
12 anywhere in your policy that states age is a consideration in determining depreciation or
13 Actual Cash Value of the personal property.” *Id.* at 2. The adjuster also noted that, in a
14 case before the Western District of Washington, the court had recently found that
15 American Family's use of age to calculate depreciation was improper. *Id.* Accordingly,
16 the adjuster requested that American Family confirm whether its depreciation calculation
17 was “solely age dependent.” *Id.*

18 On April 26, 2017, the public adjuster again responded to American Family's
19 communications. Dkt. 10-3 at 7–8. The public adjuster stated that American Family had
20 calculated “an unreasonably high depreciation amount” and stated that American
21 Family's use of age as the “sole consideration in American Family's application of
22 depreciation . . . runs contrary to the clear and unambiguous language in the policy that

1 depreciation can be determined *by physical deterioration and obsolescence.*” *Id.* at 7
2 (emphasis added).

3 By December 21, 2017, American Family had not changed its position regarding
4 its depreciation calculations, so Sparks commenced this action by filing his complaint in
5 Pierce County Superior Court. Dkt. 1-2. Sparks alleges that American Family’s
6 depreciation calculation constitutes (1) a breach of the applicable policy’s terms, (2) bad
7 faith, and (3) a violation of Washington State’s Consumer Protection Act (“CPA”). *Id.*
8 On January 17, 2018, American Family removed the case to federal court pursuant to 28
9 U.S.C. § 1332 and 28 U.S.C. § 1441. Dkt. 1.

10 On February 7, 2018, American Family filed its present motion for summary
11 judgment. Dkt. 7. On February 26, 2018, Sparks filed his response and the present cross-
12 motion for summary judgment. Dkt. 9.

13 On March 2, 2018, American Family replied on its motion for summary judgment
14 and filed an answer to the complaint. Dkts. 11, 12. On March 19, 2018, American Family
15 filed its response to Sparks’s cross-motion for summary judgment. Dkt. 13. On March 23,
16 2018, Sparks replied on his cross-motion. Dkt. 16.

17 On March 30, 2018, Sparks filed a Rule 11 motion seeking that the Court strike
18 American Family’s motion for summary judgment and impose monetary sanctions. Dkt.
19 17. On April 16, 2018, American Family responded. Dkt. 21. On April 23, Sparks
20 replied. Dkt. 23.

II. DISCUSSION

American Family and Sparks have both filed motions for summary judgment. American Family argues that the applicable legal “authorities all support the basic principle that American Family, as a matter of law, may consider age as a factor in calculating depreciation under the policies at issue.” Dkt. 7 at 16. Accordingly, American Family moves that the Court “grant summary judgment in American Family’s favor, and this case should be dismissed in its entirety and with prejudice.” *Id.* Sparks argues that “[w]hen American Family used only age in calculating the Actual Cash Value of Mr. Sparks’s personal property . . . it breached the terms of the Policy, committed bad faith, and violated the Consumer Protection Act.” Dkt. 9 at 21. Therefore, Sparks requests that the Court “grant Mr. Sparks [sic] Cross-Motion for Partial Summary Judgment on breach of contract, bad faith, and CPA violations, and deny American Family’s Motion for Summary Judgment.” *Id.*

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must

1 present specific, significant probative evidence, not simply “some metaphysical doubt”).
2 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if
3 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
4 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
5 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
6 626, 630 (9th Cir. 1987).

7 The determination of the existence of a material fact is often a close question. The
8 Court must consider the substantive evidentiary burden that the nonmoving party must
9 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
10 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
11 issues of controversy in favor of the nonmoving party only when the facts specifically
12 attested by that party contradict facts specifically attested by the moving party. The
13 nonmoving party may not merely state that it will discredit the moving party’s evidence
14 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
15 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
16 nonspecific statements in affidavits are not sufficient, and missing facts will not be
17 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

18 **A. Policy Interpretation and Age as a Factor in Calculating Depreciation**

19 The present motions focus on the construction of the policy’s provision that
20 defines Actual Cash Value as “the amount it costs to repair or replace property with
21 property of like kind and quality less depreciation for physical deterioration and
22

1 | obsolescence.” Dkt. 8-1 at 3. Specifically, the parties dispute the extent to which age can
2 | be used as a factor in assessing the depreciation of property covered in a claim.

3 | The interpretation of insurance policies and lease agreements is generally a
4 | question of law to be decided by the court. *Quadrant Corp. v. Am. States Ins. Co.*, 154
5 | Wn.2d 165, 171 (2005); *Duvall Highlands LLC v. Elwell*, 104 Wn. App. 763, 771 n.18
6 | (2001). The court construes an insurance policy as a whole, giving the policy a “fair,
7 | reasonable, and sensible construction as would be given to the contract by the average
8 | person purchasing insurance.” *Amer. Nat. Fire Ins. Co. v. B & L Trucking and Constr.*
9 | *Co., Inc.*, 134 Wn.2d 413, 427 (1998) (internal quotations omitted). However, where a
10 | material provision of a policy or contract is ambiguous, “[d]etermining a contractual
11 | term’s meaning involves a question of fact and examination of objective manifestations
12 | of the parties’ intent.” *Martinez v. Miller Indus., Inc.*, 94 Wn. App. 935, 943 (1999). A
13 | clause is ambiguous when, on its face, it is fairly susceptible to two reasonable
14 | interpretations. *Amer. Nat. Fire Ins. Co.*, 134 Wn.2d at 429.

15 | The issues raised in the parties’ motions are not new to the Court. In *Barron*, a
16 | case cited by both the parties, the Court has already determined that that the precise
17 | language at issue in American Family’s policy is clear and unambiguous. *Barron v. Am.*
18 | *Family Mut. Ins. Co.*, C16-5576 BHS, 2017 WL 1511033, at *2 (W.D. Wash. Apr. 27,
19 | 2017). The Court determined that “the common definition of obsolescence confers the
20 | idea of property losing value over time and depreciation by obsolescence may include
21 | age as a factor.” *Id.* at *2. Therefore, because the policy’s definition of Actual Cash
22 | Value subtracts “depreciation for physical deterioration *and obsolescence*,” Dkt. 8-1 at 3

1 (emphasis added), “the contract language does not preclude American Family from
2 considering age when calculating depreciation,” *Barron*, 2017 WL 1511033 at *2.
3 However, the determination that the applicable policy provision does not preclude the use
4 of age as a factor did not end the Court’s analysis. The Court further determined that the
5 plain language of the provision requires that the use of age in calculating depreciation
6 must nonetheless be grounded in actual “physical deterioration or obsolescence,” and “if
7 the passage of time (age) or other factors did not cause physical deterioration or
8 obsolescence in an item, there is no depreciation.” *Id.* (quotation marks omitted).
9 Accordingly, the Actual Cash Value provision precludes American Family from
10 categorically reducing Actual Cash Value based exclusively on an item’s age without any
11 regard for actual physical deterioration or obsolescence.

12 American Family argues that Sparks is mistaken in his interpretation that “the
13 policy allows depreciation **only** based on physical deterioration or obsolescence.” Dkt. 13
14 at 9. However, this is clearly the only reasonable interpretation of the Actual Cash Value
15 provision. That this is the only reasonable interpretation of the Actual Cash Value
16 provision was the conclusion of the decisions in both *Barron* and *Lains v. Am. Family*
17 *Mut. Ins. Co.*, C14-1982-JCC, 2016 WL 4533075, at *2 (W.D. Wash. Feb. 9, 2016).

18 While the decision in *Barron* is considerably more favorable to American Family in its
19 determination that age is relevant to the question of obsolescence, both *Barron* and *Lains*
20 make clear that depreciation calculations under the Actual Cash Value provision must be
21 based on actual physical deterioration or obsolescence, and age alone is not an
22 appropriate factor for American Family to reduce an item’s value.

1 In reaching its decision in *Barron*, the Court rejected American Family's argument
2 that its reliance on age in calculating depreciation under the Actual Cash Value provision
3 entitles them to summary judgment. The Court reaches the same result here. In *Barron*,
4 the American Family's motion was granted in part because a question before the Court
5 was whether age was a categorically inappropriate factor in calculating depreciation for
6 obsolescence. In this case however, whether age must be excluded categorically as a
7 factor in determining depreciation is clearly not at issue. Instead, the claims in this case
8 are predicated on a theory that American Family improperly devalued the property
9 covered by Sparks's policy by adjusting for depreciation based on age without any
10 investigation into or basis to find that the age of the subject property had resulted in
11 physical deterioration or obsolescence. Therefore, American Family's motion is
12 **DENIED** in its entirety.

13 To the extent that Sparks moves for summary judgment on the issue of the Actual
14 Cash Value provision's meaning, his motion is **GRANTED**. The plain language of the
15 policy's Actual Cash Value provision precludes American Family from relying on age
16 alone to devalue coverage without considering how or whether the passing of time
17 actually resulted in any physical deterioration or obsolescence.

18 **B. American Family's Use of Age in its Depreciation Calculation**

19 Having determined the meaning of the applicable Actual Cash Value provision,
20 the remaining questions before the Court involve whether American Family is liable as a
21 matter of law under Sparks's present legal claims for its method of adjusting the
22 insurance claim. Specifically, the Court must determine whether American Family's

1 depreciation calculations in Sparks’s insurance claim (1) constituted a breach of contract,
2 (2) were made in bad faith, or (3) violated the CPA. But before the Court can address the
3 merits of Sparks’s claims in their applicable legal framework, the Court must first assess
4 whether genuine disputes of material fact exist as to the method in which American
5 Family calculated depreciation in Sparks’s insurance claim.

6 The remaining issues in Sparks’s motion are all predicated on a theory that
7 American Family considered age alone when assessing depreciation of the covered
8 property in his claim. Sparks has strong evidence to support his position. An email from
9 American Family requesting that an adjuster supplement his “detailed personal property
10 list” with the age of each item is the only instance in which American Family sought
11 further information on Sparks’s claim prior to rejecting the adjuster’s estimate. Dkt. 10-1
12 at 77. Another email from American Family states plainly that its depreciation calculation
13 “was based on [items’] age over their expected lifespan,” and because some items were
14 “over their expected lifespan” American Family valued those items as worthless. Dkt. 10-
15 3 at 3. For instance, an antique Tiffany floor lamp originally worth \$169.00 was deemed
16 worthless because it was 50 years old, Dkt. 10-2 at 42; two down comforter sets
17 originally worth a combined \$129.95 were deemed worthless for being 10 years old, *id.*
18 at 44; two work jackets worth \$150.00 each were deemed worthless because they were 10
19 years old, *id.* at 56; a Persian rug originally worth \$1,199.00 was deemed worthless
20 because it was 10 years old, *id.* at 45. In one particularly egregious example, two
21 professional level flutes originally worth over \$1,600 each were deemed worthless
22 because they were 25 years old. *Id.* at 49. After being questioned regarding its formula by

1 the adjuster, American Family arbitrarily “changed the depreciation from 100% to 90%
2 to give some value to those” items that American Family had deemed worthless based on
3 their age. Dkt. 10-3 at 3–4.

4 Additionally, communications from American Family expressly state that its
5 formula for calculating Actual Cash Value under the policy was based on an item’s:

6 Age divided by normal Useful life, unless otherwise noted. Deviation from
7 Age divided by normal Useful life is common due to inspection evaluation,
8 condition of the item, obsolescence, product research, expert opinions,
9 utility/functional value, market value and in some cases all or some of the
10 above.

11 Dkt. 10-3 at 15–16. This definition indicates that American Family’s practice is to
12 initially calculate depreciation based exclusively on age and expected lifespan, and then
13 subsequently deviate from that calculation if evidence suggests that deviation is
14 necessary. It is clear from American Family’s email communications referenced above
15 that its depreciation calculations in this case stopped after the initial calculation based on
16 age and that American Family’s subsequent revision from 100% to 90% depreciation for
17 many items had no basis in the items’ actual physical condition or obsolescence. *See* Dkt.
18 15-1.

19 In response, American Family has argued that whether it relied exclusively on age
20 in its calculations is a question of fact not ripe for summary judgment. Specifically,
21 American Family argues that its contractor, National Vendor, uses a program called to
22 Xactimate to calculate Actual Cash Value and that American Family “is not privy to the
formula Xactimate uses to reach the ACV.” Dkt. 13. *See also* Dkt. 15 at 2–3. American
Family also argues that its adjuster, Mr. Elinger, “believes that the ACV figures per item

1 [from the Xactimate formula] took into consideration *minimally* when the item was
2 purchased and its useful lifespan.” Dkt. 13 at 3 (emphasis added). However, Mr.
3 Elinger’s actual declaration states: “it is my understanding that the ACV figures took into
4 consideration when the item was purchased and its useful lifespan.” Dkt. 15 at 3. This
5 does not suggest that the items’ age and estimated useful lifespan played a *minimal* role
6 in American Family’s Actual Cash Value calculation. In fact, Elinger’s declaration does
7 not indicate that the Xactimate Actual Cash Value calculation took into consideration
8 anything other than the items’ age and estimated useful lifespan. This is consistent with
9 Elinger’s statements that the depreciation calculation was based on the items’ “age over
10 their expected lifespan.” Dkt. 10-3 at 2–3.

11 Despite arguing that there is a genuine dispute as to whether its depreciation
12 calculation was based on anything other than the covered items’ age, American Family
13 has failed to submit evidence suggesting that there were any other factors that it took into
14 consideration. In opposing summary judgment, “nonspecific statements in affidavits are
15 not sufficient, and missing facts will not be presumed.” *Lujan*, 497 U.S. at 888–89.
16 American Family is correct that this summary judgment proceeding has been initiated at
17 an early stage, but it was American Family that first moved for summary judgment.
18 Moreover, even if American Family believes it could obtain evidence regarding the
19 Xactimate formula to show that it takes into consideration factors other than age to assess
20 depreciation for physical deterioration or obsolescence, American Family has failed to
21 request a Rule 56(d) continuance for the purpose of obtaining such discovery. On the
22 record before the Court, there is no genuine dispute over the fact that when adjusting

1 Sparks's claim, American Family based its depreciation calculation exclusively on the
2 covered property's age over expected lifetime.

3 Therefore, because there is no genuine dispute of material fact over the method in
4 which American Family calculated depreciation when handling Sparks's insurance claim,
5 the Court can address the merits of Sparks's claims for (1) breach of contract, (2) bad
6 faith, and (3) violations of the CPA.

7 **1. Breach of Contract**

8 In Washington, "[a] breach of contract is actionable only if the contract imposes a
9 duty, the duty is breached, and the breach proximately causes damage to the claimant."

10 *Northwest Independent Forest Mfrs. v. Dept. of Labor and Indust.*, 78 Wn.App. 707, 712

11 (1995). The applicable insurance policy provides that Sparks was entitled to receive

12 Actual Cash Value for his claim, which consists of "the amount it costs to repair or

13 replace property with property of like kind and quality less depreciation for physical

14 deterioration and obsolescence." Dkt. 8-1 at 3. This language imposed a duty on

15 American Family to predicate any depreciation calculation for the covered property on

16 actual "physical deterioration and obsolescence" and precluded such reductions based

17 exclusively on the property's age. As explained above, American Family's depreciation

18 calculations included an across-the-board devaluation based solely on the age of the

19 covered property without inquiry into its actual physical condition or obsolescence. This

20 constitutes a breach of American Family's duty under the Actual Cash Value provision of

21 the applicable policy.

1 It must be noted that the policy does requires that insureds provide “a detailed
2 inventory of the damaged property, showing the quantities, when and where acquired,
3 original cost, current value and the amount of loss,” attaching “to the inventory bills,
4 receipts and related documents that substantiate all amounts.” Dkt. 8-1 at 13.
5 Accordingly, it would have been appropriate for American Family to require that Sparks
6 provide information regarding the condition and usefulness of the covered property
7 before accepting his claim. In fact, it was likely necessary. Applicable insurance
8 regulations make clear that “[i]nsurers are responsible for the accuracy of evaluations to
9 determine actual cash value.” WAC 284-30-380(7) (emphasis added). Notwithstanding
10 the policy provisions stating that a claim should show the property’s “current value,”
11 American Family has failed to cite to any evidence that it has ever conducted an
12 investigation into the physical deterioration or obsolescence of the covered property other
13 than to request that Sparks’s public adjuster provide the covered items’ age. *See* Dkt. 10-
14 1 at 77.

15 American Family has made several assertions that it encouraged Plaintiff to
16 submit additional information. *See* Dkt. 13 at 3 (citing Dkt. 15 at 3) (“The list was sent to
17 [the public adjuster] on January 17, 2017. [American Family] encouraged [the public
18 adjuster] to provide additional information regarding specific items in order to reach a
19 fair ACV.”). However, a review of the actual communications between American Family
20 and the public adjuster reveals no such encouragement. *See* Dkts. 10-1, 10-3. Regardless,
21 even the declaration relied upon by American Family indicates that it applied its
22 exclusively age-based depreciation formula to Spark’s claim *before* conducting any

1 investigation or purportedly informing the adjuster that he could submit additional
2 information regarding the covered property's condition. Furthermore, if American Family
3 did in fact encourage the public adjuster to submit additional information regarding the
4 covered property's condition, the emails exchanged immediately after American Family
5 returned its actual cash value estimate reveal that such encouragement could only have
6 occurred *after* (1) the public adjuster responded that the depreciation calculations were
7 inappropriately severe, (2) American Family offered to arbitrarily increase the value of its
8 100% depreciation calculations to 90%, (3) American Family revealed that its
9 depreciation formula was based exclusively on age over expected lifespan, and (4) the
10 public adjuster objected that applying such a line-item formula based solely on age was
11 unlawful. *See* Dkt. 10-3 at 2–5. Finally, American Family has failed to show any
12 evidence suggesting that it ever informed Sparks what type of information or
13 documentation it would accept or require in order to arrive at an accurate actual cash
14 value determination. American Family was entitled, and perhaps obligated, to request
15 further information regarding the “current value” of the covered property before
16 approving or reducing Sparks's claim. However, the policy did not authorize American
17 Family to automatically reject Sparks's claim and offer a reduced amount based on a
18 formula for depreciation that considers only the items' age before conducting a
19 reasonable investigation into the property's actual physical deterioration or obsolescence.

20 The Court further finds that the record indisputably shows Sparks has suffered
21 some damages, but questions of fact remain as to the amount of the damages. For
22 instance, it is clear that Sparks was damaged by American Family's breach of contract

1 when it devalued a Tiffany lamp purchased as an antique by 100% (and subsequently
2 90%) based solely on the lamp's age. *See* Dkt. 15-1 at 41. This is true as to numerous
3 other items as well, but the Court need not provide a comprehensive list for the purposes
4 of this order. *See* Dkt. 15-1. The difficulty is that questions remain as to the actual value
5 of the covered property based on each item's actual physical condition and obsolescence.
6 While no rational juror could find that the passing of time by itself has rendered a Tiffany
7 lamp purchased as an antique significantly less valuable due to obsolescence, the same
8 cannot be said of an eight-year-old laptop. *See* Dkt. 15-1 at 92. Therefore Sparks is
9 entitled to summary judgment on the question of American Family's liability for breach
10 of contract, although the extent of his damages remains a genuine factual dispute.

11 To the extent Sparks moves for summary judgment on the basis that American
12 Family's Actual Cash Value determination constituted a breach of contract, Sparks's
13 motion is **GRANTED**. However, Sparks's request that the Court find as a matter of law
14 that he is entitled to \$52,445.20 in damages is **DENIED**.

15 **2. Bad Faith**

16 Beyond the express terms of an insurance policy, insurers have a duty to act in
17 good faith and deal fairly with insureds separate from their contractual coverage
18 obligations. *See Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 393 (1992) (recognizing that
19 insurer has an "enhanced obligation of fairness toward its insured" that "imposes a duty
20 beyond that of the standard contractual duty of good faith"); *Tank v. State Farm Fire &*
21 *Casualty Co.*, 105 Wn.2d 381, 385–86 (1986) (holding that the fiduciary relationship
22 underlying the insurer's duty of good faith imposes a responsibility to give equal

1 consideration to an insured's interests). Violation of this duty will give rise to a tort action
2 for bad faith. “To succeed on a bad faith claim, the policyholder must show the insurer's
3 breach of the insurance contract was unreasonable, frivolous, or unfounded,” and
4 “[w]hether an insurer acted in bad faith is a question of fact.” *Smith v. Safeco Ins. Co.*,
5 150 Wn.2d 478, 484 (2003). For the question of bad faith to be resolved on summary
6 judgment, “there must be no disputed facts pertaining to the reasonableness of the
7 insurer’s action in light of all the facts and circumstances of the case.” *Id.* at 486. As
8 explained above, the Actual Cash Value provision in American Family’s policy
9 unambiguously requires that devaluations for depreciation be based on physical
10 deterioration or obsolescence. American Family’s depreciation reduction was applied to
11 Sparks’s claim without any inquiry or investigation into the condition or usefulness of the
12 covered property prior to its loss; instead, when requesting supplemental information to
13 determine depreciation, American Family asked only for the property’s age. Dkt. 10-1 at
14 77.

15 In addition to the unambiguous language of the policy itself, it should be noted
16 that this is the third time in the past two years that this district has found that the Actual
17 Cash Value provision precludes American Family from using age to apply an across-the-
18 board devaluation for covered property. Despite the decision in *Lains* that American
19 Family “improperly took age into consideration when determining depreciation,” *Lains*,
20 2016 WL 4533075 at *2, American Family nonetheless persisted in the exact same
21 practice when adjusting Sparks’s claims. Similarly, this Court recently found in *Barron*
22 that “[i]f the passage of time (age) or other factors did not cause physical deterioration or

1 | obsolescence in an item, there is no depreciation” under the Actual Cash Value provision.
2 | *Barron*, 2017 WL 1511033 at *2. That decision was rendered in response to a motion
3 | from which American Family’s present motion appears to have been copied and pasted.
4 | Nonetheless, American Family has persisted in asserting that its use of age constitutes an
5 | appropriate basis for its devaluation of Sparks’s insurance claim without any
6 | investigation or inquiry into the covered items’ actual physical condition or obsolescence.

7 | As explained above, American Family was not obligated to accept the public
8 | adjuster’s appraisal and offer to pay the replacement cost of the items as initially
9 | submitted to them. Indeed, American Family would have been well within its rights to
10 | request additional information regarding the property’s condition and obsolescence—
11 | including the property’s age— in order to calculate depreciation. However, American
12 | Family instead automatically rejected Sparks’s claim and offer a reduced amount based
13 | on solely on the items’ age. Any reasonable insurer should recognize that such a practice
14 | will systematically result in inaccurate actual cash value calculations that are likely to be
15 | substantially less than the value of insureds’ claims. *See* WAC 284-30-380(7); WAC
16 | 284-30-330(7). When insurance regulations place the onus on American Family to
17 | accurately determine Actual Cash Value, American Family cannot justifiably argue that it
18 | acted in good faith just because it was and remains willing to further adjust Sparks’s
19 | claim if he provides unspecified evidence of “current value” that American Family has
20 | never requested.

1 The Court finds that no reasonable mind could differ in finding that American
2 Family acted unreasonably when it applied a blanket depreciation reduction based solely
3 on age to calculate the Actual Cash Value of Sparks's covered property. Accordingly,
4 Sparks's motion for summary judgment is **GRANTED** and the Court finds as a matter of
5 law that American Family's depreciation calculation was made in bad faith.

6 **3. Consumer Protection Act**

7 Under the CPA, a person may bring a civil action against a business to recover
8 damages stemming from any "[u]nfair methods of competition and unfair or deceptive
9 acts or practices in the conduct of any trade or commerce." RCW 19.86.020. "To
10 establish a claim under the CPA, five elements must be established: '(1) unfair or
11 deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact;
12 (4) injury to plaintiff in his or her business or property; (5) causation.'" *Svensden v.*
13 *Stock*, 143 Wn.2d 546, 553 (2001) (quoting *Hangman Ridge Training Stables, Inc. v.*
14 *Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986)). "[B]ad faith constitutes a per se
15 violation of the CPA." *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App.
16 666, 678 (2012) (quoting *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150
17 Wn. App. 1, 12 (2009)). *See also* RCW 48.01.030. Accordingly, having found that
18 Sparks is entitled to summary judgment on the issue of whether American Family's
19 depreciation calculation constituted bad faith, the Court must also grant summary
20 judgment in favor of Sparks's CPA violation.

1 Additionally, it should be noted that “[a] violation of an insurance regulation
2 constitutes an unfair trade practice, which may result in CPA liability if the remaining
3 elements are established.” *Wellman & Zuck, Inc. v. Hartford Fire Ins. Co.*, 170 Wn. App.
4 666, 678 (2012). Sparks has cited several insurance regulations that he claims were
5 violated by American Family’s practice. First, Sparks argues that American Family’s
6 practice for calculating depreciation violated WAC 284-30-330(4), which prohibits
7 insurers from “[r]efusing to pay claims without conducting a reasonable investigation.”
8 The Court agrees that American Family violated WAC 284-30-330(4) when it refused to
9 pay Sparks’s claim and instead reduced the covered property’s value based solely on its
10 age. Before denying Sparks’s claim and depreciating the value of the covered property,
11 American Family was required to perform a reasonable investigation into the covered
12 property’s physical deterioration or obsolescence. While an agent of American Family
13 may have visited Sparks’s destroyed home to perform an inspection, such a visit
14 understandably failed to reveal any relevant information regarding the condition or
15 usefulness of the property before it was destroyed in the fire. *See* Dkt. 15 at 2. Beyond
16 this, the record shows that the only information American Family sought regarding
17 depreciation before rejecting Sparks’s claim and responding with a severely reduced
18 estimate consisted of an email requesting the age of each item of covered property. Dkt.
19 10-1 at 77. As the Court has already stated, American Family’s decision to calculate
20 depreciation based solely on the age of the covered property was an unreasonable. The
21 Record establishes that American Family failed to conduct a reasonable investigation into
22

1 the condition and usefulness of the covered property before it rejected Sparks's claim and
2 offered its own severely reduced estimate.

3 Second, Sparks argues that American Family violated WAC 284-30-330(1) by
4 "[m]isrepresenting pertinent facts or insurance policy provisions." Specifically, Sparks
5 argues that American Family misrepresented the Actual Cash Value provision of its
6 policy in violation of WAC 284-30-350(1), which requires that insurers "fully disclose to
7 first party claimants all pertinent benefits, coverages or other provisions of an insurance
8 policy or insurance contract under which a claim is presented." The Court agrees. There
9 is no dispute that American Family has repeatedly represented to Sparks that depreciation
10 under the Actual Cash Value provision is a product of "age divided by normal useful life"
11 and that the provision authorized American Family to reduce Sparks's claim based solely
12 on the covered property's age. *See* Dkt. 10-3 at 3, 15. Notably, American Family has also
13 represented that the Actual Cash Value provision allows "deviation" from American
14 Family's "age divided by normal useful life" formula based on the condition or
15 obsolescence of the item. *Id.* at 15. But such a statement plainly misrepresents the Actual
16 Cash Value provision by telling insureds that calculations based on the condition and
17 obsolescence of an item condition are the *exception* to the rule. In fact, under the policy's
18 provision, Actual Cash Value calculations based on condition or obsolescence *are* the
19 rule, and it is a misrepresentation of the policy's terms for American Family to suggest
20 that it can rely exclusively on its age-based formula to reject a claim and reduce Actual
21 Cash Value for depreciation without conducting any reasonable investigation into the
22 covered property's actual physical condition or obsolescence. By representing to Sparks

1 that depreciation under the Actual Cash Value provision is based on an item's age
2 divided by its expected lifespan, American Family failed to fully disclose the coverage of
3 the policy which entitles Sparks to the full cost to repair or replace the covered property
4 with like kind or quality unless the property has suffered from physical deterioration or
5 has become obsolete.

6 Third, Sparks argues that American Family violated WAC 284-30-330(6) by
7 failing to promptly investigate Sparks's claims. The Court declines to find that American
8 Family violated WAC 284-30-330(6). As stated above, the record shows that American
9 Family indeed failed to conduct a reasonable investigation of Sparks's claims, because its
10 investigation did not reasonably seek information regarding the actual condition or
11 obsolescence of the covered property. However, WAC 284-30-330(6) deals with an
12 insurer's obligation to promptly effectuate a settlement in which liability has become
13 reasonably clear. There is nothing in the record or Sparks's arguments to suggest that
14 American Family has dragged its feet or has not moved promptly to resolve Sparks's
15 claim.

16 Fourth, Sparks argues that American Family has violated WAC 284-30-330(7),
17 which prohibits insurers from compelling a first party claimant to submit to litigation,
18 arbitration, or appraisal "by offering substantially less than the amounts ultimately
19 recovered in such actions or proceedings." While the Court recognizes that, based on its
20 previous analysis, it is likely that American Family's practice for calculating depreciation
21 runs afoul of WAC 284-30-330(7), Sparks has yet to conclusively establish what amount
22 is actually owed under the policy and to what extent American Family undervalued his

1 claim. Accordingly, since WAC 284-30-330(7) prohibits the practice of offering
2 “*substantially* less than the amount *ultimately* recovered,” (emphasis added), the Court
3 declines to find at this time that American Family’s handling of Sparks’s claim violated
4 WAC 284-30-330(7) as a matter of law.

5 Finally, Sparks argues that American Family violated WAC 284-30-330(3), which
6 prohibits insurers from “[f]ailing to adopt and implement reasonable standards for the
7 prompt investigation of claims arising under insurance policies.” Specifically, Sparks
8 argues that American Family failed to implement the regulatory standard that “[i]nsurers
9 are responsible for the accuracy of evaluations to determine actual cash value.” WAC
10 284-30-380(7). Based on the Court’s analysis above, it is clear that American Family
11 failed to implement this regulatory standard to take responsibility in accurately
12 determining Actual Cash Value. The Court has already found that American Family’s
13 depreciation adjustment was made in bad faith when it unreasonably undervalued the
14 covered property’s Actual Cash Value based on age without any regard to the property’s
15 actual physical condition or obsolescence.

16 The violation of each of these insurance regulations constitutes a “per se” unfair
17 trade practice. Washington statutes further dictate that such practices impact the public
18 interest, as they took place in the course of adjusting an insurance claim. RCW 48.01.030
19 (“The business of insurance is one affected by the public interest, requiring that all
20 persons be actuated by good faith, abstain from deception, and practice honesty and
21 equity in all insurance matters.”). Also, because American Family’s conduct resulted in
22

1 an undervaluation of Sparks's claim, American family has caused injury to Sparks in his
2 business or property.

3 Based on the foregoing, Sparks's motion for summary judgement is **GRANTED**
4 to the extent that American Family violated the CPA by (1) rejecting his claim without
5 adequately investigating the actual physical condition or obsolescence of the covered
6 property, (2) representing that the policy defines depreciation as "age over expected
7 lifespan," and (3) applying depreciation to the covered property based solely on its age
8 without regard to actual physical deterioration or obsolescence. Further, the Court finds
9 that American Family's violation of the CPA entitles Sparks to reasonable attorney fees
10 as well as statutory treble damages not to exceed \$25,000 pursuant to RCW 19.86.090.
11 However, as the exact extent of damages remains to be determined, and will likely be a
12 disputed question of fact, the Court declines to enter an award for a specific sum.

13 **C. Rule 11 Motion**

14 Sparks has also moved for sanctions pursuant to Rule 11. Rule 11(b) provides:

15 (b) By presenting to the court a pleading, written motion, or other
16 paper . . . an attorney or unrepresented party certifies that to the best of the
17 person's knowledge, information, and belief, formed after an inquiry
18 reasonable under the circumstances:

17 (1) it is not being presented for any improper purpose, such as
18 to harass, cause unnecessary delay, or needlessly increase the cost of
19 litigation;

19 (2) the claims, defenses, and other legal contentions are
20 warranted by existing law or by a nonfrivolous argument for extending,
21 modifying, or reversing existing law or for establishing new law;

21 (3) the factual contentions have evidentiary support or, if
22 specifically so identified, will likely have evidentiary support after a
reasonable opportunity for further investigation or discovery; and

1 (4) the denials of factual contentions are warranted on the
2 evidence or, if specifically so identified, are reasonably based on belief or a
lack of information.

3 Fed. R. Civ. P. 11(b). If a party violates Rule 11(b), the opposing party may move for
4 sanctions pursuant to Rule 11(c). Fed. R. Civ. P. 11(c)(2). “If warranted, the court may
5 award to the prevailing party the reasonable expenses, including attorney’s fees, incurred
6 for the motion.” *Id.*

7 Sparks argues that sanctions against American Family are warranted on the basis
8 that American Family’s motion was frivolous in light of the Court’s previous order in
9 *Barron*. Sparks notes that American Family’s counsel appears to have copied their
10 previous brief from the summary judgment proceedings in *Barron* almost verbatim in
11 their present motion. *Compare* Dkt. 7 with *Barron*, C16-5576 BHS, Dkt. 44. However,
12 while *Barron* dealt with the question of whether age was ever an appropriate factor in
13 assessing depreciation, that question is not present in this case. In this case, the relevant
14 issue is whether American Family improperly devalued the property covered in Sparks’s
15 claim by assessing depreciation based on age without any investigation or basis to
16 suggest that the age of the property had resulted in physical deterioration or obsolescence.

17 As Sparks has pointed out, American Family’s motion appears to be “recycled”
18 briefing from the proceedings in *Barron*. American Family’s counsel has responded by
19 arguing that it is not required to reinvent the wheel in each case. *See* Dkt. 21 at 3. Indeed,
20 it might even be considered irresponsible if attorneys billed their clients for drafting a
21 motion from scratch when previously successful portions of already drafted materials are
22 directly relevant to a new project. Usually, such recycling might consist of copying over

1 relevant legal standards and rules. But American Family’s motion presents a product that
2 falls below the standard one might hope to see when attorneys recycle portions of older
3 briefs.

4 Most glaringly, American Family’s present motion seeks summary judgment on
5 the basis that Sparks’s claims are predicated solely on a faulty theory that was presented
6 in *Barron*, even though that theory is not actually asserted in Sparks’s complaint.
7 Specifically, American Family’s motion repeatedly represents that it “is entitled to
8 summary judgment as a matter of law on *all of Plaintiffs’ claims* because *they are all*
9 *predicated on the legally incorrect premise* that American Family’s insurance policies
10 preclude the use of age in calculating depreciation.” Dkt. 7 at 2 (emphasis added). *See*
11 *also id.* at 1 (“Plaintiffs . . . argue that age must be categorically excluded in applying
12 depreciation”); *id.* at 10 (“Their dispute *is limited to* whether age may be considered
13 when determining the amount of depreciation.”) (emphasis added); *id.* at 12
14 (“Presumptively, Plaintiffs will allege that this statement is an exclusive limitation on
15 how depreciation is calculated, that only ‘physical deterioration and obsolescence’ may
16 be considered, and that because the word ‘age’ is not included, age may not be
17 considered in the calculation.”); *id.* at 13 (“Plaintiff will contend that age may not be
18 considered in calculating depreciation because the word does not appear in the
19 policies.”). However, Sparks’s complaint plainly states that his claims are predicated on a
20 theory that American Family “improperly used age for purposes of applying improperly
21 high depreciation values to Plaintiff’s personal property claims” by failing to “show that
22 the passage of time caused physical deterioration or obsolesce of each item of personal

1 property *before* using age as a basis for depreciation” Dkt. 1-2 at 2 (emphasis
2 added). Therefore, it is clear that Sparks does not argue that age is always an
3 inappropriate factor in depreciation calculations; rather, he asserts that American Family
4 devalued his insurance claim with improperly high depreciation calculations by
5 automatically applying an across-the-board formula based solely on age without regard
6 for whether the passing of time actually resulted in physical deterioration or
7 obsolescence.

8 American Family’s lazily copied brief even attributes a quoted argument to
9 Sparks’s complaint which does not actually exist in the complaint. *See* Dkt. 7 at 8
10 (quoting “FAC ¶ 28”). While American Family’s counsel has referred to this as merely a
11 “regretful clerical error,” *see* Dkt. 21 at 3, the wholesale copying of the firm’s previous
12 brief—which was denied to the extent it is relevant to the allegations in the present
13 complaint—has resulted in a poor product that presents more problems than a mere
14 clerical mistake. As explained above, it misrepresents the entire basis of Sparks’s claims
15 in a manner that is clearly inconsistent with the allegations of the complaint.

16 American Family further explains that it believed that its motion was relevant in
17 light of communications from Sparks’s counsel which suggested that this lawsuit is
18 predicated on a theory that age can never be used as a factor in depreciation calculations.
19 *See* Dkt. 21 at 2–4. The communication that most strongly supports this argument is an
20 email from the public adjuster of Sparks’s insurance claim, transmitted in February 2017,
21 nearly a year before this case was filed. Dkt. 22-1 at 17. Additionally, in August of 2017,
22 Sparks’s counsel sent an email to American Family’s counsel asserting that “it is

1 improper for American Family to use age, rather than deterioration and obsolescence, to
2 depreciate Mr. Sparks' personal property." Dkt. 14-1 at 1. But both of these
3 communications were sent prior to the commencement of this lawsuit, and all of the
4 remaining communications cited by American Family make clear that Sparks's complaint
5 is predicated on the theory that American Family improperly relied upon age *alone* in
6 assessing depreciation. Dkt. 22-1 at 10–12, 18–20.

7 Ultimately, the Court declines to issue sanctions. The Court's discussion above is
8 alone sufficient to encourage better briefing practices in the future. There is sufficient
9 evidence in communications from Sparks's counsel sent before the commencement of
10 this lawsuit from which American Family's counsel could rationally infer that this case
11 presented the question of whether age was a categorically impermissible consideration in
12 calculating depreciation under the policy. This does not justify American Family's
13 request to have the entire case dismissed based on its repeated assertion that this was the
14 *only* issue presented in this case, particularly when the pleadings and numerous
15 communications from Sparks's counsel stated otherwise. But the Court has already
16 determined that Sparks will be entitled to reasonable attorney fees in light of his
17 successful CPA claim. Adding sanctions on top of such an award is unnecessary. It is
18 penance enough that the motion remains on a publicly accessible docket.

19 **III. ORDER**

20 Therefore, it is hereby **ORDERED** that American Family's motion for summary
21 judgment (Dkt. 7) is **DENIED**, Sparks's motion for sanctions (Dkt. 17) is **DENIED**, and
22

1 Sparks's motion for summary judgment is **GRANTED in part and DENIED in part** as
2 set forth above.

3 Dated this 10th day of May, 2018.

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5 BENJAMIN H. SETTLE
6 United States District Judge
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